

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 16, 2024

CV-23-1861

In the Matter of CARLA UU.,
Appellant,

v

CAMERON UU.,
Respondent.

(Proceeding No. 1.)

MEMORANDUM AND ORDER

In the Matter of CAMERON UU.,
Respondent,

v

CARLA UU.,
Appellant.

(Proceeding No. 2.)

Calendar Date: March 25, 2024

Before: Egan Jr., J.P., Lynch, Reynolds Fitzgerald, Ceresia and Powers, JJ.

Todd G. Monahan, Schenectady, for appellant.

Theresa M. Suozzi, Saratoga Springs, for respondent.

Vicki J. Prager, Northville, attorney for the children.

Powers, J.

Appeal from an order of the Family Court of Montgomery County (Michael G. Dayian, J.), entered August 11, 2023, which, among other things, partially granted petitioner's application, in proceeding No. 2 pursuant to Family Ct Act article 6, to modify a prior order of custody.

Cameron UU. (hereinafter the father) and Carla UU. (hereinafter the mother) are the parents of three children, a son (born in 2009 [hereinafter the oldest child]) and two daughters (born in 2016 and 2018 [hereinafter the younger children]). The mother and the father entered into a separation agreement in June 2019, which was later modified by a November 2019 addendum, pursuant to which the parties agreed to share joint legal custody of the children with the mother having primary physical custody and the father having certain parenting time. Pursuant to the terms of the addendum, the parties also agreed "not to move more than 50 miles away from their current residence with[out] the consent of the court or express written consent of the other parent." In March 2020, Supreme Court (Tomlinson, J.) issued a final judgment of divorce which merged this agreement and the addendum.

In May 2022, the mother filed a petition for modification seeking, among other things, sole legal custody of the children. Then, in August 2022, the father filed a petition for modification alleging that the mother had moved to a new home located further than the agreed-upon 50 miles with the intention to enroll the children in a new school. As a result, the father sought primary physical custody of the children. Following fact-finding and *Lincoln* hearings, Family Court dismissed the mother's petition finding that she had failed to establish that there had been a breakdown in the parties' communication which left them unable to effectively coparent. As to the father's petition, the court found that the mother's relocation constituted a change in circumstances and that it was in the best interests of the oldest child to grant the father primary physical custody allowing the oldest child to continue to attend his former school. As to the younger children, the court found that "there [was] no compelling reason to modify their current[] custodial arrangement," thereby resulting in a separation of the oldest child from the younger children. Family Court granted the father's petition to this extent and set a schedule of parenting time that allows all three children to have parenting time together. The mother appeals.

We affirm. As an initial matter, neither party disputes the existence of a change in circumstances since the March 2020 judgment of divorce settling custody (*see Matter of*

David V. v Roseline W., 217 AD3d 1112, 1113 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]; *Matter of Michael NN. v Robert OO.*, 210 AD3d 1326, 1326 [3d Dept 2022], *lv denied* 39 NY3d 910 [2023]), and our review of the record confirms Family Court's determination in this respect. Specifically, the increase in the father's travel time resulting from the mother's move (*see Matter of Shayne FF. v Julie GG.*, 221 AD3d 1202, 1204 [3d Dept 2023]), as well as the mother's unilateral decision to enroll the children in the Shenendehowa School District, established the requisite change in circumstances (*see Matter of David BB. v Danielle CC.*, 216 AD3d 1281, 1283 [3d Dept 2023]; *Matter of Mathena XX. v Brandon YY.*, 189 AD3d 1733, 1734-1735 [3d Dept 2020]; *Matter of Turner v Turner*, 166 AD3d 1339, 1339 [3d Dept 2018]).¹ Thus, the only issue before this Court is whether Family Court's order serves the best interests of the oldest child.

"In making a best interests determination, Family Court must consider a variety of factors, including the quality of the parents' respective home environments, the need for stability in the child's life, each parent's willingness to promote a positive relationship between the child and the other parent and each parent's past performance, relative fitness and ability to provide for the child's intellectual and emotional development and overall well-being" (*Matter of Jehrica K. v Erin J.*, 223 AD3d 1079, 1081 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Warda NN. v Muhammad OO.*, 217 AD3d 1086, 1087-1088 [3d Dept 2023]). "This Court accords great deference to Family Court's factual findings and credibility determinations, and will not disturb its custodial determination if supported by a sound and substantial basis in the record" (*Matter of David V. v Roseline W.*, 217 AD3d at 1113 [internal quotation marks, ellipsis and citations omitted]; *see Matter of Giuseppe V. v Tiffany U.*, 224 AD3d 1122, 1124 [3d Dept 2024]; *Matter of Jahleel SS. v Chanel TT.*, 201 AD3d 1172, 1174 [3d Dept 2022]).

We reject the mother's contention that Family Court erred in determining that joint legal custody remained feasible. "Generally, joint legal custody is the preferred arrangement, unless the evidence demonstrates that the parties are unable to work together and communicate cooperatively" (*Matter of Chad KK. v Jennifer LL.*, 219 AD3d 1581, 1583 [3d Dept 2023] [internal quotation marks and citations omitted]). "The fact that there are some disagreements will not necessarily render joint custody improper

¹ The father's submissions in support of his modification petition demonstrate that there is a driving route that can be taken from the marital residence to the mother's new residence that is less than 50 miles – which the father conceded during the fact-finding hearing – establishing that the mother did not violate the terms of the separation agreement (*see generally Jeffrey P. v Alyssa P.*, 202 AD3d 1409, 1414 [3d Dept 2022]).

where the parents' relationship is not so acrimonious as to render the joint custody award unworkable" (*Matter of Joseph L. v Heather K.*, 214 AD3d 1041, 1043 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]). The record demonstrates that the mother and the father had disagreements on occasion and the father sometimes spoke to the mother in a negative manner. However, they remain fit and loving parents who are able to constructively communicate regarding the children. Thus, there is a sound and substantial basis in the record to find that joint legal custody is still feasible under the circumstances presented here (*see Matter of Chad KK. v Jennifer LL.*, 219 AD3d at 1583-1584; *compare Matter of John M. v Tashina N.*, 218 AD3d 935, 937 [3d Dept 2023]; *Matter of Joshua XX. v Stefania YY.*, 218 AD3d 893, 896 [3d Dept 2023]).

We find no basis upon which to disturb Family Court's finding that granting the father primary physical custody of the oldest child was in that child's best interests, despite this resulting in the oldest child's separation from the younger children. "Although . . . sibling relationships should not be disrupted unless there is some overwhelming need to do so, this rule is not absolute and may be overcome where . . . the best interests of each child lie with a different parent" (*Matter of Curry v Reese*, 145 AD3d 1475, 1476 [4th Dept 2016] [internal quotation marks, brackets and citations omitted]; *accord Matter of Alexis X. [Tara Y.]*, 222 AD3d 1213, 1215 [3d Dept 2023]; *see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). In this respect, while the mother has served as the primary caregiver for the children, both parents are fit, have stable home environments and are able to provide for the oldest child seemingly equally. However, the record reflects that following the oldest child's enrollment in the Shenendehowa School District, his grades dropped, and he was no longer active in sports and extracurricular activities as he had been previously. Moreover, the oldest child had established strong friendships and connections in his former school district, whereas the younger children did not as a result of their young age at the time of the move. Consequently, the oldest child's need for stability is served by granting the father physical custody inasmuch as this allows the oldest child to continue enrollment in his former school. In addition, while it is just one factor to be considered in determining what custody arrangement is in the best interests of the child, the oldest child's expressed desire, as indicated to Family Court by the attorney for the children, to reside with the father so that he may attend his former school district "is entitled to great weight given [his] age" (*Matter of Anthony YY. v Emily ZZ.*, 189 AD3d 1924, 1925 [3d Dept 2020] [internal quotation marks and citation omitted]; *see Matter of Denise VV. v Ian VV.*, 205 AD3d 1090, 1091 [3d Dept 2022]).

Thus, considering that Family Court had the opportunity "to observe the [oldest] child and ascertain [his] level of maturity and ability to articulate [his] preferences"

(*Matter of Winston v Gates*, 64 AD3d 815, 818 [3d Dept 2009]), and according deference to Family Court's credibility and factual determinations, we are satisfied that a sound and substantial basis exists in the record to conclude that it is in the best interests of the oldest child to primarily reside with the father (*see Matter of Clarke v Clarke*, 222 AD3d 751, 753 [2d Dept 2023]; *Matter of Hart v Hart*, 218 AD3d 582, 583 [2d Dept 2023]; *Matter of Gulzar v Gulzar*, 173 AD3d 1183, 1184 [2d Dept 2019], *lv denied* 34 NY3d 906 [2019]; *Matter of Robinson v Davis*, 58 AD3d 1041, 1042 [3d Dept 2009]). Although not determinative, we note that the attorney for the children supports the father having primary physical custody of the oldest child (*see Matter of Jesse FF. v Amber GG.*, 222 AD3d 1254, 1258 [3d Dept 2023]; *compare Matter of Valenti v Valenti*, 57 AD3d 1131, 1135-1136 [3d Dept 2008], *lv denied* 12 NY3d 703 [2009]).

Egan Jr., J.P., Lynch, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court